

The ALJ found "[c]laimant had been requested to submit to a medical examination pursuant to K.S.A. 44-515. On at least two occasions, with proper notice and after the [r]espondent had fully complied with all of the provisions of K.S.A. 44-515 the [c]laimant

failed to appear for the medical examinations."<sup>1</sup> Pursuant to K.S.A. 44-518, the ALJ dismissed claimant's claim.

Claimant acknowledges that he missed two scheduled appointments for independent medical examinations. However, claimant argues that his claim should not be dismissed because he did not refuse to attend those appointments. Rather, he failed to attend the first appointment due to a misunderstanding and the second due to the theft of his vehicle, leaving him without transportation.

Respondent contends the ALJ's Order for Dismissal should be affirmed. Claimant missed two scheduled appointments with Dr. C. Reiff Brown for an independent medical examination pursuant to K.S.A. 44-515. Respondent argues claimant's failure to attend the two scheduled appointments amounted to a "refusal" within the meaning of the statute.<sup>2</sup> Claimant willfully used the money advanced by respondent for mileage and per diem for other purposes and then claimed he was financially unable to keep the first appointment. As for the second appointment, respondent argues that claimant has given more than one explanation for missing that appointment. His inconsistent statements render his excuse not credible. Furthermore, even if claimant's car was stolen, claimant made no effort to secure an alternate means of transportation. Hence, his conduct was again willful and amounted to a refusal to attend the appointment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein and having considered the parties' arguments, the Board finds that the ALJ's Order of Dismissal should be reversed.

Claimant fractured his right ankle in a work-related accident on February 24, 2003. Respondent designated Suhail Ansari, M.D., as claimant's authorized treating physician. Dr. Ansari performed two surgeries on claimant's right ankle. Thereafter, in a chart note dated October 14, 2003, he stated:

Mr[.] Romero has missed his appointment several times. He had removal of hardware from the ankle and has healed operative wounds without complication. He appears distracted and moderately haggard. Note he had admitted to taking drugs in the recent past. Range of motion is full and free and he is able to perform all activities and is discharged with no restriction. MMI expected in 3 months.<sup>3</sup>

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<sup>1</sup> Order for Dismissal (May 18, 2004).

<sup>2</sup> K.S.A. 44-518.

<sup>3</sup> Respondent's/Insurance Carrier's Motion to Dismiss, Ex. A (filed March 30, 2004).

Respondent scheduled claimant for an independent medical examination by C. Reiff Brown, M.D., at Garden City, Kansas, to be performed on February 11, 2004. Claimant's attorney was notified of that appointment by a letter dated January 23, 2004, and a check was provided in the amount of \$179.16 for mileage and per diem.<sup>4</sup> Claimant failed to keep that appointment.

Respondent re-scheduled an appointment for an independent medical examination by Dr. Brown at Garden City, Kansas, for March 10, 2004. Claimant failed to keep that appointment.

At the May 14, 2004 hearing on respondent's Motion to Dismiss, claimant acknowledged receiving advance notice of both appointments with Dr. Brown and acknowledged receiving the check from respondent for mileage and per diem. Claimant initially indicated that he was confused about the check and thought it was a reimbursement or disability payment. He later explained that because he was not working and was not receiving temporary total disability compensation, he used the mileage check for living expenses and was then financially unable to make the trip from his home in Amarillo, Texas, to Garden City for the appointment. He said he missed the second appointment because his vehicle was stolen the day before his appointment. There also seems to be some confusion about whether claimant may have also said that he was in jail on the date of the second appointment.

On cross examination, claimant admitted that he initially told his attorneys that he had missed the first appointment due to car trouble. But in fact, he had spent the money advanced by respondent for his travel expenses on personal bills and then had no money to purchase gasoline for the trip to see Dr. Brown.

Likewise on cross examination claimant appears to acknowledge that although his car was stolen on March 9, 2004, he did not report it stolen until March 16, 2004. The testimony is not clear on this point but in any case, this is the date claimant was placed in jail on an outstanding warrant.

Although this case presents a close question, the Board concludes that claimant's conduct did not amount to a refusal to attend the medical examinations.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the May 18, 2004 Order for Dismissal entered by Administrative Law Judge Pamela J. Fuller is reversed.

**IT IS SO ORDERED.**

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<sup>4</sup> Respondent's/Insurance Carrier's Motion to Dismiss, Ex. B (filed March 30, 2004).

Dated this \_\_\_\_ day of September 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Lawrence M. Gurney, Attorney for Claimant  
Kerry McQueen, Attorney for Respondent and Insurance Carrier  
Pamela J. Fuller, Administrative Law Judge  
Paula Greathouse, Workers Compensation Director